

May 23, 2007

Kathryn S. Berthot  
Chief, Spectrum Enforcement Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C336  
Washington, DC 20544

Re: *Freedom of Information Act Request (Control No. 2007-235); File Nos. EB-06-SE-1 48, EB-06-SE-356, and EB-06-SE-2.50; MB Docket No. 07-57*

Dear Ms. Berthot:

The National Association of Broadcasters (“NAB”), by its attorneys, hereby responds to the April 20, 2007 letters from XM Radio, Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius”) relating to the above-referenced proceedings.<sup>1</sup> XM and Sirius are responding to NAB’s Freedom of Information Act (“FOIA”) request of March 22, 2007.<sup>2</sup> They ask the Commission to withhold from public inspection materials they submitted in connection with various Commission letters of inquiry regarding compliance with Commission rules governing FM modulators/transmitters used with their satellite Digital Audio Radio Service (“satellite DARS”) systems, and, in XM’s case, compliance with Commission rules and authorizations regarding terrestrial repeaters. XM urges the Commission to withhold material from public inspection pursuant to FOIA Exemptions

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<sup>1</sup> See Letter from James S. Blitz, Vice President and Regulatory Counsel, XM Radio, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division (April 20, 2007) (“XM Letter”); Letter from Robert L. Pettit, Wiley Rein LLP, Counsel to Sirius Satellite Radio, Inc., to Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau (April 20, 2007) (“Sirius Letter”).

<sup>2</sup> See Letter from David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel to NAB, to Anthony J. Dale, Managing Director, Federal Communications Commission (March 22, 2007) (“FOIA Request,”). The Commission notified XM and Sirius of the FOIA Request and provided them the opportunity to respond because XM and Sirius had, in the first instance, requested confidential treatment of their submissions. See Letter from Kathryn S. Berthot, Chief Spectrum Enforcement Division, Enforcement Bureau, to Robert L. Pettit, Wiley Rein, LLP, Counsel to Sirius Satellite Radio, Inc. (April 9, 2007); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to James S. Blitz, Vice President and Regulatory Counsel, XM Radio, Inc. (April 9, 2007). The XM Letter and Sirius Letter followed and the Enforcement Bureau provided copies to Counsel for NAB on May 10, 2007 and May 16, 2007, respectively, and agreed that NAB’s response would be due May 23, 2007.

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4 and 6, 5 U.S.C. § 552(b)(4) & (b)(6), while Sirius argues that material should be withheld pursuant to FOIA Exemptions 4 and 7A, *id.* § 552(b)(4) & (b)(7)(A).<sup>3</sup>

Because of the strong public interest in such materials being considered as part of the public record in the XM/Sirius merger proceeding, the Commission should deny XM's and Sirius's confidentiality requests and provide NAB the records it is seeking in the FOIA Request.<sup>4</sup>

**I. Long-standing Principles Favoring Openness in Commission Licensing Procedures Compel Disclosure of the XM and Sirius Submissions.**

**A. There is a compelling public interest in having access to information regarding XM's and Sirius's potential rule violations because such information has a direct bearing on the pending XM/Sirius Merger Application.**

NAB's FOIA Request seeks records relating to potential rule violations by XM or Sirius relating to the FM modulators/transmitters and terrestrial repeaters used in their systems. Even if the Bureau determines that XM and Sirius have met their burden to demonstrate that specific records fall within a FOIA exemption,<sup>5</sup> NAB is entitled to access to this information in connection with its intention to file a petition to deny the proposed merger between XM and Sirius.<sup>6</sup> Information regarding the potential rule violations has a direct bearing on the merger application. Indeed, one of the critical elements of the Commission's public interest analysis with regard to this proposed merger is whether XM and Sirius have the requisite "character qualifications" to hold

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<sup>3</sup> See XM Letter at 1; Sirius Letter at 1.

<sup>4</sup> See *Applications of XM Satellite Radio Holdings, Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Applications for Authority to Transfer Control of XM Radio and Sirius Satellite Radio Inc.*, MB Docket No. 07-57 (March 20, 2007) ("*XM/Sirius Merger Application*").

<sup>5</sup> Unfortunately, NAB is not in a position to evaluate whether XM or Sirius have met this stringent burden of proof. At the time NAB filed the FOIA Request, it was unaware that XM and Sirius had requested confidential treatment of the material. The information contained in the XM Letter and the Sirius Letter is insufficient to enable NAB to judge whether the particular documents or portions thereof are covered by one of the FOIA exemptions. NAB therefore must rely at this point on the Bureau's expertise and judgment to make the initial determination of which records fall within an exemption.

With regard to Sirius's claim under FOIA Exemption 7(A) (Sirius Letter at 5-7), however, NAB has already demonstrated that this exemption is not available to either XM or Sirius since the material in question is in their possession and already known to them. FOIA Request at 3. To the extent that these materials also bear on investigations of parties other than XM and Sirius, the public interest still favors disclosure of such information, even if Exemption 7(A) might apply as to those other parties. See *supra* text at 2-7.

<sup>6</sup> See Letter from David K. Rehr, President & CEO, National Association of Broadcasters, to The Honorable Kevin J. Martin, Chairman, Federal Communications Committee (March 22, 2007); see also *Applications of XM Satellite Radio Holdings, Inc., Transferor, and Sirius Satellite Radio, Inc., Transferee, Consolidated Applications for Authority to Transfer Control of XM Radio and Sirius Satellite Radio, Inc.*, MB Docket No. 07-57, NAB Ex Parte Communication (April 10, 2007) ("*NAB Ex Parte*").

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Commission licenses.<sup>7</sup> Moreover, the Commission may “treat any violation of any provision of the Act, or of the Commission’s rules, as predictive of an applicant’s future truthfulness and reliability and, thus, as having a bearing on an applicant’s character qualifications.”<sup>8</sup>

As a petitioner against the merger application, NAB is generally entitled to have access “to all information submitted by licensees that bear on their applications,” including the information it is seeking through the FOIA Request. Indeed, access to such information is critical in order that NAB may evaluate any impact that XM’s and Sirius’s potential rule violations may have on the companies’ “character qualifications,” and, more important, on whether the companies can be relied upon in the future to comply with FCC rules or with any conditions imposed or offered as part of the merger.”

Information that can shed light on the scope, nature, and degree of such violations is particularly relevant to this evaluation. For example, with regard to the FM modulators/transmitters, information regarding which models of the FM modulators/transmitters were non-compliant, how many non-compliant devices were produced, imported, and sold, and what percentage of the devices in use in the market are non-compliant is critical for understanding the market impacts of XM’s and Sirius’s violations. Facts relating to the overall circumstances surrounding both the FM modulator/transmitter and terrestrial repeater violations are also critical. How did the violations occur? Were the violations intentional? Who in the companies caused or knew of the violations? When and under what circumstances did each person learn of the violations? What did each person do to respond to these potential violations? All such information bears directly on the merged entity’s future reliability.

The records that NAB is now seeking clearly contain this type of information. XM, for example, asserts that its submissions include “explicit descriptions of XM’s internal business processes, including analysis of and information about XM’s network architecture and its strategic approach to repeater deployment,” and that they include “names and job-related information

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<sup>7</sup> *AT&T, Inc. and BellSouth Corp., Applications for Transfer of Control*, 2007 FCC LEXIS 2363 \*280 ¶ 191 (rel. March 26, 2007) (“*AT&T/BellSouth Merger Order*”); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18379 ¶ 171 (2005); *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20576 ¶ 28 (2002) (“*EchoStar/DirectTV Merger Order*”); *XM/Sirius Merger Application* at 9; see also *NAB Ex Parte*, Memorandum from David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel to NAB, to David K. Rehr, President & CEO, National Association of Broadcasters, at 7-9 (Feb. 23, 2007).

<sup>8</sup> *AT&T/BellSouth Merger Order*, 2007 FCC LEXIS 2363 \*280 ¶ 191.

<sup>9</sup> See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24837 ¶ 33 (1998) (“*Confidentiality Policy Statement*”). Indeed, the Commission expects that, in Title III licensing cases, “requests for confidentiality or protective orders in licensing proceedings will and should remain relatively rare.” *Id.*, 13 FCC Rcd at 24838 ¶ 34.

<sup>10</sup> See *EchoStar/DirectTV Merger Order*, 17 FCC Rcd at 20579 ¶ 35 (stating that EchoStar’s “history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives”).

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about current and former XM employees, as well as specific information about their conduct.”” Regarding potential violations relating to the FM modulators/transmitters, XM states that the submissions include “information on the number of units of the eight identified devices, the number of units at factories and at distributors, and activated units with consumers,” “information concerning the number of units activated, sold and distributed,” and “information regarding when XM became aware of non-compliance, what modification were made to XM radios, and who was involved in the decision to make such modifications.”<sup>12</sup>

Similarly, Sirius’s submissions include details regarding “the steps that Sirius has taken to respond to [the Commission’s] investigation, along with Sirius’s internal methods and procedures for regulatory compliance,” “detailed information about the number of devices manufactured, [and] the number of devices in inventory . . .,” and “the details of the investigation undertaken by Sirius, including the steps that the company took internally and externally to ascertain the scope of any potential compliance issue. . . .”<sup>13</sup> Even more critical, Sirius states that its submission includes information regarding “individuals within Sirius who were aware of the compliance issues,” “internal communications between Sirius employees regarding product development and modification,” and “communications between Sirius and its suppliers.”<sup>14</sup> This type of information is particularly important because Sirius has already admitted that the unlawful FM modulators/transmitters were produced at the specific requests of some of its employees to the relevant manufacturers.<sup>15</sup> Indeed, Sirius supplemented its original submission on three separate occasions in order to provide additional information regarding “individuals within Sirius who were aware of the compliances issues . . . .”<sup>16</sup>

In sum, NAB has a compelling interest in having access to the information XM and Sirius have provided to the Commission with regard to potential violations relating to the FM modulators/transmitters and, in XM’s case, terrestrial repeaters, used with their satellite **DARS** systems. Such information bears directly on the public interest considerations raised by the pending merger application. Further, because such information is so closely intertwined with the facts of the merger proceeding, the compelling public interest in obtaining access to the information clearly outweighs any confidentiality interests XM and Sirius may have with regard to such information. Put another way, the fact that “disclosure of such information may reflect adversely

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<sup>11</sup> XM Letter at 3.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> Sirius Letter at 12, 14, 15, 18.

<sup>14</sup> *Id.* at 22, 23.

<sup>15</sup> Sirius Satellite Radio Inc. SEC Form 10-Q at 35 (Nov. 8, 2006) (“certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules”).

<sup>16</sup> Sirius Letter at 26-30.

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upon” XM and Sirius in their merger proceeding “is not a legitimate basis for prohibiting release.”<sup>7</sup>

**B. The Commission has previously ordered disclosure of this kind of material in closely analogous circumstances.**

Disclosure of the records requested in the FOIA Request is also consistent with Commission and court precedent, which holds that federal agencies have discretion to release information on public interest grounds, even if the information falls within the scope of a FOIA exemption.<sup>18</sup> For example, in *Liberty Cable*, in the context of a Title III application proceeding, the Commission upheld the Wireless Telecommunications Bureau’s (“WTB”) decision to disclose an internal audit report and related attachments concerning issues related to Liberty’s unauthorized operation of fixed microwave facilities to provide service to certain buildings in New York. Liberty’s audit report sought “to explain how the many instances of its unauthorized [operational fixed microwave service (“OFS”)] activities occurred” and therefore required Liberty “to identify individuals and other entities who were involved in those licensing operations. . . .”<sup>20</sup>

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<sup>17</sup> *Liberty Cable Company, Inc.*, 11 FCC Rcd 2475, 2476 ¶ 7 (1996), *aff’d sub nom. Bartholdi Cable Company Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997); *see also National Exchange Carrier Ass’n, Inc.*, 5 FCC Rcd 7184 ¶ 3 (1990) (finding that mere “public embarrassment, unfavorable publicity, or customer disgruntlement are not generally considered” to be sufficient reasons to keep information confidential).

<sup>18</sup> The Commission always retains the discretion to “permit disclosure of materials for which confidential treatment is sought to the extent that policy considerations favoring disclosure outweigh those supporting non-disclosure.” *Northeast Communications & Wisconsin, Inc.*, 15 FCC Rcd 3289, 3291 ¶ 6 (2000). *See also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987) (“The agency’s decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies . . ., or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.” (emphasis supplied)); *Larry D. Henderson and Robert S. Benz d/b/a Quad Communications*, 15 FCC Rcd 17073, 17076 ¶ 10 (2000) (denying a request for confidential treatment where the materials implicated important rights of both parties concerning the use of a 900 MHz Specialized Mobile Radio service license); *Confidentiality Policy Statement*, 13 FCC Rcd at 24818 ¶ 2 (“Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.”); *Liberty Cable*, 11 FCC Rcd at 2475 ¶ 3 (affirming a decision by the Wireless Telecommunications Bureau to deny confidentiality to material concerning Liberty’s license applications, in part because “the public interest in disclosure of the materials justified release as a matter of Commission discretion”); *Gulf Coast Services, Inc.*, 14 FCC Rcd 8163, 8165 ¶ 5 (WTB 1999) (denying a request for confidentiality for financial data submitted as part of a license application because “the public interest considerations favoring openness in our licensing proceedings outweigh any potential difficulty that Gulf Coast might experience by disclosure of this information”).

<sup>19</sup> *Liberty Cable*, 11 FCC Rcd at 2475 ¶ 2.

<sup>20</sup> *Id.* at 2477 ¶ 15.

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The Commission denied confidential treatment of the audit report on the basis that public interest considerations outweighed any need to protect the audit report.<sup>21</sup> With regard to FOIA Exemption 4, the Commission reasoned:

[T]he audit report contains information that is directly relevant to Liberty's OFS applications and its STA requests. Release of the audit report will thus serve to inform interested parties and the public about the implications of Liberty's licensing activities.<sup>22</sup>

With regard to Exemption 6, the Commission found:

[E]ven assuming a protectable privacy interest does exist, we find that significant public policy considerations warrant disclosure. The privacy interests identified by Liberty clearly are minor and are so intertwined with the facts of the underlying proceedings that the public's interest in openness in our licensing proceedings outweighs any privacy interests.<sup>23</sup>

The D.C. Circuit upheld the Commission's decision on appeal.<sup>24</sup> The court cited specifically the Commission's conclusion that "the public has a compelling interest in the information at issue as it bears directly on [the applicant's] fitness as a license . . . ."<sup>25</sup>

The Commission again applied the *Liberty Cable* rationale in *Northeast Communications* as a basis for compelling disclosure of financial information submitted as part of a short-form auction application.<sup>26</sup> The Commission reasoned:

[F]airness to the other participants in the auction requires that this financial information be accessible to the public. Competing bidders and the public in general have a compelling interest in having access to the information . . . because it bears directly on Northeast's eligibility for bidding credits.<sup>27</sup>

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<sup>21</sup> *Id.* at 247711 11, 15.

<sup>22</sup> *Id.* at 2477 ¶ 11.

<sup>23</sup> *Id.* at 2477 ¶ 15.

<sup>24</sup> *Bartholdi Cable*, 114 F.3d at 282.

<sup>25</sup> *Id.*

<sup>26</sup> *Northeast Communications*, 15 FCC Rcd at 3289 ¶ 1.

<sup>27</sup> *Id.* at 3291 ¶ 6.

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Furthermore, the *Liberty Cable* principles apply broadly across Commission proceedings and are not limited to the licensing context alone. In *Larry D. Henderson*, the WTB required Gelico, Inc., a 900 MHz SMR licensee, to disclose certain material submitted with its response to a “Petition to Purge Authorization.”<sup>28</sup> The WTB denied confidential treatment, in part because, under *Liberty Cable*, the public interest “considerations favoring openness in Commission licensing proceedings compelled disclosure of at least portions of the documents.”<sup>29</sup> On application for review, Gelico argued that *Liberty Cable* did not apply because its case involved enforcement rather than licensing.<sup>30</sup> The Commission rejected Gelico’s argument and upheld the WTB, finding that “the principles articulated in *Liberty Cable* concerning procedural fairness to parties in our licensing proceedings should be equally applied here.”<sup>31</sup>

The principles articulated in *Liberty Cable* similarly compel disclosure of the material NAB is seeking in its FOIA Request. Indeed, *Liberty Cable* is directly analogous to the situation here and should be controlling. Both *Liberty Cable* and the FOIA Request involve information that a petitioner requires in connection with its opposition to a pending application. Further, the information NAB is seeking here is virtually identical to the information the Commission disclosed in *Liberty Cable*. The audit report at issue in *Liberty Cable* sought “to explain how the many instances of its unauthorized OFS activities occurred” and contained “a complete description of the company’s internal operating procedures, including the identities and functions of key persons” as well as “information regarding customers and potential customers . . . ,’ including all of its service contracts and ‘start dates.’”<sup>32</sup> This description almost precisely matches the descriptions that XM and Sirius provide of the information contained in their various submissions.<sup>33</sup>

## II. Conclusion

In sum, the *XM/Sirius Merger Application*, as a matter of law, places XM’s and Sirius’s prior rule violations at issue. The public interest, therefore, requires disclosure of information regarding such violations notwithstanding any confidentiality interests that might have resulted in a different balance had the merger application never been filed. Accordingly, the Commission

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<sup>28</sup> *Larry D. Henderson*, 15 FCC Rcd at 17074 ¶ 3.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 17076 ¶ 9.

<sup>31</sup> *Id.* at 17076 ¶ 10.

<sup>32</sup> *Liberty Cable*, 11 FCC Rcd at 2476 ¶¶ 8, 10, 2477 ¶ 15.

<sup>33</sup> See *supra* text at 4.

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should deny XM's and Sirius's confidentiality requests **and** provide NAB the records it is seeking in the FOIA Request.

Respectfully submitted,

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